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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 547

SOUTH FLORIDA TELEVISION CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, AND L. B. WILSON, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-5a) is reported at 349 F. 2d 971. The decision of the Federal Communications Commission (Pet. 6a-27a) is reported at 37 F.C.C. 511.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Commission, was entered on July 8, 1965. The petition for a writ of certiorari

was filed on October 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's decision to grant a renewal application for a television broadcast license violated the provision of the Communications Act which states that no license "shall be construed to create any right beyond the * * * periods of the license."

2. Whether the Commission's consideration of a renewal applicant's broadcasting record violated the provisions of the Communications Act which require the Commission to grant licenses only in the "public interest, convenience and necessity."

3. Whether petitioner was denied a fair and impartial hearing because the Commission considered the broadcasting operations engaged in by the incumbent licensee.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in Appendix C to the Petition, pages 28a–30a.

STATEMENT

This case involves the broadcast license for television Channel 10 at Miami, Florida. Comparative hearings commenced before the Commission in 1953, and on February 7, 1957, the Commission adopted a decision granting the application of Public Service Television, Inc., and denying the three competing

applications, among which was that of L. B. Wilson, Inc. ("Wilson"). *WKAT, Inc.*, 22 F.C.C. 117. The case was appealed to the United States Court of Appeals for the District of Columbia Circuit. That court, without deciding the merits, remanded the case to the Commission (at its request) with instructions to hold an evidentiary hearing on publicly made charges that one or more of the applicants had engaged in improper conduct in attempting to secure an award from the Commission. *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (C.A.D.C.).

Following an evidentiary hearing, the Commission found that the three applicants other than Wilson had attempted improperly to influence the results of the prior proceeding through *ex parte* approaches; it determined that each of these was disqualified to be a broadcast licensee. The Commission therefore set aside the earlier permit and awarded the permit to Wilson, the sole remaining qualified applicant. *WKAT, Inc.*, 29 F.C.C. 216. Its order provided, however, for a four-month license term rather than the customary three-year term, so that there would be an early reexamination of the qualifications of the grantee and an early opportunity for new applicants, if any, to be considered.

This decision was challenged on appeal by the disqualified parties and by a prospective new applicant, who urged that the Commission should not have licensed Wilson but should instead have accepted new applications immediately. The court affirmed, holding that the Commission's action was "well within its

authority and was a reasonable one." *WKAT, Inc.* v. *Federal Communications Commission,* 296 F. 2d 375 (C.A.D.C.), certiorari denied *sub nom. Public Service Television, Inc.* v. *Federal Communications Commission,* 368 U.S. 841.

After four months of operation, Wilson filed its application for renewal. Three other applications (including petitioner's) for the same channel were also filed within the time specified by a Commission order. The four applications were designated for hearing to determine, on a comparative basis, which of the proposed operations would better serve the public interest, convenience and necessity. 47 U.S.C. 307(d), 47 U.S.C. 309(a); *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327.

After a full evidentiary hearing, an examiner's initial decision, the filing of exceptions thereto and oral argument before the Commission, the agency granted Wilson's application and denied the competing applications (Pet. App. 6a–26a, 37 F.C.C. 511). The principal bases for the decision were Wilson's integration of ownership with management, and its broadcast experience (Pet. App. 25a). The majority of its stock was held by individuals, Miami residents, who would participate actively in the day-to-day affairs of the station (Pet. App. 19a–22a, 25a–26a). The Commission also found that Wilson's long broadcast record as licensee of a radio station in Cincinnati was satisfactory. Its operation of Channel 10 had "many commendable aspects" but the Commission weighed this "in the light of the unusual circum-

stances" that the station had been on the air for only a short period of time and its record had been compiled with knowledge that the station's application for renewal would probably be contested by other applicants (Pet. App. 22a–23a). The Commission concluded, therefore, that the past broadcast performance had only "minor" significance (Pet. App. 23a), although it added "somewhat" to the superiority found on other grounds (Pet. App. 26a).

The major contention on appeal was that the Commission erred in considering Wilson as a licensee seeking renewal, and that, instead, Wilson should have been considered merely a temporary operator, with no favorable consideration being given to it by reason of its previous operation of the channel. In a *per curiam* opinion, Senior Circuit Judge Edgerton and Judge Fahy held that it was not improper for the Commission to accord Wilson the status of a licensee and that the applicant received no "unfair advantage" from being so considered. The court concluded that all factors necessary to a decision had been considered by the Commission and the result reached was "a reasoned and reasonable judgment of the agency charged with primary responsibility in the matter" (Pet. App. 4a). Judge Wright dissented on the ground that an incumbent licensee is not entitled to "a preferential position" when seeking renewal.

ARGUMENT

Both Judge Wright in dissent and petitioner in contending that this Court should grant certiorari errone-

ously treat this case as one in which the Commission based its award, either in whole or in part, on an applicant's status as an incumbent licensee. An examination of the Commission's opinion discloses, rather, that the Commission relied entirely on permissible factors in assessing the merits of the competing applicants, and that Wilson's incumbency was relevant only insofar as it demonstrated a certain level of broadcasting performance—and even for that limited purpose, it was accorded little weight.

1. Whenever a broadcast license expires, "channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public" and that interest includes "the ability of the licensee to render the best practicable service to the community reached by his broadcasts." *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470, 475. If applications in addition to the incumbent's renewal request are filed, all are consolidated for a comparative hearing, and in that hearing the past record of the incumbent, as well as the records of competing applicants, are relevant.[1] It would ob-

[1] The Commission's approach in this case is plainly consistent with the intent of Congress in this matter. The 1952 amendments to the Communications Act contained a substantial revision of Section 307(d) dealing with renewal of broadcast licenses. Although the law relieved broadcasters of certain requirements as to the submission of information at renewal time, the legislative history expressly provided for a consideration of the past record of the licensee. The Senate Report states: "It should be emphasized that while the recommended amendment does eliminate the necessity for the type of involved and searching examination which the Commission must make in

viously be appropriate in such a hearing for the Commission to consider the inadequacies of an incumbent's performance during the original license period as a factor militating against renewal. It is correspondingly proper for the Commission to weigh in a renewal applicant's favor the commendable aspects of his performance record. That is all the Commission did in this case. It did not, as petitioner suggests, accord any weight to Wilson's existing license *per se*.

This is apparent from the Commission's opinion. The Commission held that Wilson's status was that of a licensee and not that of a mere temporary operator, but that this status would be given limited weight because of the short duration of the license and Wilson's foreknowledge that its license would be up for renewal after four months (Pet. App. 12a). These two considerations patently affect the weight to be accorded Wilson's status only if the quality of its performance during that period is the relevant measure; if mere status as an incumbent licensee was the criterion which the agency used, the fact that the licensee knew that his authorization would expire in four

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granting an original license, it does not in any way impair the Commission's right and duty to consider, in the case of a station which has been in operation and is applying for renewal, the over-all performance of that station against the broad standard of public interest, convenience, and necessity. This authority of the Commission is made explicit by specifying that such renewal grants are subject to findings by the Commission that the 'public interest, convenience, or necessity would be served thereby.'" Sen. Rep. No. 44, 82d Cong., 1st Sess. (1951), p. 7.

months would not bear in any manner upon that status.

This reading of the Commission's opinion is further supported by the Commission's discussion of "Past Broadcast Performance" (Pet. App. 22a–23a), where, in terms similar to that used in the earlier portion of its opinion, the agency observed that the usual "persuasive evidence" of past broadcast performance was limited in this case by "the unusual circumstances under which it was compiled" (Pet. App. 23a). Nor was any reference made in the Commission's "Summary" (Pet. App. 25a) to licensee status as such. The Commission enumerated, *inter alia*, "past record of broadcast performance" as one criterion but noted, *with reference to that factor alone*, that "it cannot be accorded the normal significance * * * in view of the circumstances under which this record, particularly in Miami, was made" (*ibid.*).

Consequently, even assuming, *arguendo*, that it would have been impermissible for the agency to consider incumbency *per se* as a factor in awarding a comparative license, that course was not followed here. A reading of the complete opinion, we believe, demonstrates conclusively that licensee status was considered relevant only insofar as it established a record of prior broadcast performance.

2. There is no merit to the claim that the Commission violated the Act's policy of free competition for broadcast licenses by considering the record of an in-

cumbent licensee. Indeed, the "public interest, convenience, and necessity" demand that the Commission assess the performance of the renewal applicant with respect to the license sought to be renewed. Both *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327, and *Community Broadcasting Co.* v. *Federal Communications Commission*, 274 F. 2d 753 (C.A.D.C.), on which petitioner relies, concerned temporary grants without comparative hearings to one of two competing applicants—a course which was held impermissible in the absence of a clear showing of public need. In the present case comparative hearings have been held, and the award has been made by the Commission on the basis of established and approved criteria.

3. Nor is there substance in the claim that the Commission unfairly relied on operations engaged in during the pendency of the hearings. The Commission held that its examiners had erred in excluding a "supplemental showing" of "performance for the entire period of [Wilson's] stewardship," but it found the error to be nonprejudicial (Pet. App. 12a–13a). There is no indication in the Commission's opinion that it relied on any performance beyond the 4-month record which the examiner admitted into evidence (Pet. App. 22a), and no basis whatever for supposing that what Wilson was doing during the hearing affected the result reached by the Commission.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965